

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-7011

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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JEFF TRACHTMAN, et al., :

Plaintiffs-Appellants, :

-against- :

IRVING ANKER, etc., et al., :

Defendants-Appellants. :

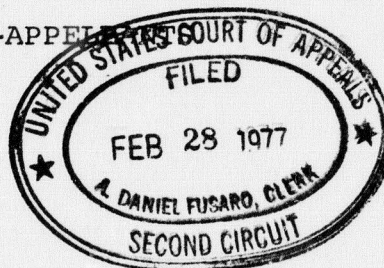
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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF THE STATE OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLANTS



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Questions Presented

1. May a public high school consistent with the First Amendment prohibit students from distributing a survey concerning students' sexual attitudes?

2. May public high school officials consistent with the First Amendment prohibit students from distributing to fellow high school students below the age of 14 years a survey concerning students' sexual attitudes?

Statement of the Case

This case involves questions that were presumably resolved by the Supreme Court's decision in Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) and this court's decision in Eisner v. Stamford Board of Education, 440 F.2d 803 (2d Cir. 1971). Those cases stand for the proposition that the distribution of constitutionally protected literature by students may be restricted only where expected that the distribution will substantially or materially disrupt school activities. Nevertheless defendant school officials have attempted to prevent plaintiff, a high school student, from distributing a survey asking his schoolmates for their attitudes and opinions concerning a number of sexual topics. Defendants claim neither that the survey is obscene or otherwise unprotected by the First Amendment nor that its distribution will be disruptive. Rather, they assert the vague fear, wholly unsupported by reference to particular events or persons, that the subject matter of the survey will be harmful to high school students.

The district judge, although rejecting defendants' claim that First Amendment rights can be abridged on the basis of such vague and generalized assertions, prohibited

distribution of the survey to those high school students who were in the 9th and 10th grades. She did so, we suggest, on the basis of evidence no less vague or generalized. Plaintiff believes that his inability to distribute the questionnaire to his 9th and 10th grade schoolmates, that is, those students who are under 15 years of age, substantially detracts from the value of the survey. To that extent, his First Amendment rights, as well as those of his under-15 schoolmates, have been abridged without the showing required in Tinker and Eisner.

Plaintiff sought relief by way of a declaratory judgment and injunction to permit the student plaintiff and his fellow students to randomly distribute to Stuyvesant High School pupils a written survey of high school students' sexual attitudes. Jurisdiction was invoked under Title 28, U.S.C. §§1343 and 2201 et seq. and Title 42, U.S.C. §1983.

On December 15, 1976, the court below issued its Memorandum Opinion, from which defendants appealed. Plaintiffs cross-appealed from so much of the Order as prohibited distribution of the survey to students in the high school younger than 15 years of age. In the meantime, the district

court's order directing that the parties formulate a plan for distribution of the survey has been stayed. Consequently, the survey has not yet been distributed.

Statement of Facts

There is little disagreement between the parties as to the essential facts. The plaintiff, while an editor of a publication at the high school, The Stuyvesant Voice, and other members of the editorial staff of the publication, sought permission of the Principal to conduct a random survey among students respecting their sexual attitudes. It was proposed that a questionnaire prepared by the students would be randomly distributed to the student body with a cover letter, with the responses to the questionnaire to be tabulated and an interpretive article for publication to be prepared by the editorial staff of the periodical. The Principal denied the students permission to conduct their survey. The students sought reconsideration of the Principal's determination from pertinent officers of the Board of Education. The Board's Administrator of Student Affairs affirmed the denial of permission. An appeal was made to the Chancellor. The Chancellor did not respond to the appeal, and with the passage of

time, the Board of Education rejected the appeal, affirming the Principal's refusal to permit distribution of the survey. The Board's denial emphasized that surveys in general, and those dealing with sexuality in particular, required that they be conducted under the auspices of "professional researchers". Defendants submitted affidavits from psychologists and psychiatrists speculating that the confrontation of students at the high school with the proposed questionnaire, and the impact of deciding whether or not to respond, would likely result in psychological harm to some unspecified number (albeit a minority) of the high school population. Plaintiffs in turn submitted affidavits of psychologists asserting that the claimed harm to students was speculative and incapable of demonstration.

The opinion below, to which plaintiffs take but limited exception, accurately summarizes the factual assertions of the parties and their respective positions on this appeal.

Judge Motley stated:

"The thrust of defendants' evidence is serious harm could result if certain students were confronted with the particular questions in the survey. It is argued that many high school students are only beginning to develop sexual preferences and that their 'identities' are in a state of rapid development. To be asked such pointed questions at

this stage in their lives would force those students who are emotionally immature to confront difficult issues prematurely. The result, defendants claim, is that certain students may become quite apprehensive or even unstable as a result of answering this questionnaire..."

"The Court finds defendants' analysis of possible harm to be unconvincing with respect to the junior and senior students. In fact, it appears that such a questionnaire would have substantial beneficial effects. It cannot be denied that New York City high school students are today confronted with an avalanche of explicit sexual information and misinformation. Many a newsstand in the midtown area is the functional equivalent of a pornographic shop. Stuyvesant High School is located on the lower east side of Manhattan. Courses in sex education are taught in the school. Information about sex - both correct and incorrect - is imparted daily on television, on radio and via the rash of new sex magazines about town. With a wry blend of hyperbole and truth, one of plaintiff's affiants asserts that 'any youngster sufficiently fragile to suffer serious anxiety or depression upon reading questions which (s)he may ignore with impunity or respond to anonymously, is a youngster too fragile to have survived the trip from home to school.'" (Memo. Op. pp. 7,8)

ARGUMENT

LIMITING DISTRIBUTION OF THE SURVEY TO STUDENTS 15 AND OLDER VIOLATES PLAINTIFF'S FIRST AMENDMENT RIGHTS.

Plaintiffs limit their appeal only to that portion of the Order of the learned court below that limit the distribution of their questionnaire to upperclassmen at stuyvesant High School. It is plaintiffs' contention that the

applicable reasoning to be applied to this situation embraces both the right of the plaintiffs to secure distribution to their younger fellow students, as well as the right of freshmen and sophomores at Stuyvesant High School, albeit of 13 and 14 years of age, to receive, if they so wish, the questionnaire (Griswold v. Connecticut, 361 U.S. 479, at 482). The very values that Judge Motley found in the student initiative that led to the proposed survey are applicable to the younger students at the school, being part of the population who might randomly be among the target population of the survey. The plaintiffs have no quarrel with the proposals in the Order of Judge Motley detailing the guiding elements for the negotiation of a method of distribution of the survey. They emphatically seek, however, to enlarge those proposals on this appeal, to embrace distribution of the survey to the school's younger students. It is the plaintiffs' submission that the concern of the court below that anxiety may be visited upon the younger students is of the very nature of the "undifferentiated fear or apprehension of disturbance" that has been stricken down as unnecessarily trammeling upon constitutionally protected rights afforded even high school

students. This court, in its analysis of the limits of students' rights to freedom of expression, placed the "theoretical underpinning for the authority of the school officials to control...speech [to] ...the principle at least as old and as formidable as Schenck v. United States, 249 U.S. 47, 52... that '[t]he question in every case is whether the words are used in certain circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.'" Eisner v. Stamford Board of Education, 440 F.2d 803, 807 (1971).

In the circumstances of this case, the defendants have not demonstrated the clarity or the presentness of the danger, either to the older students at the school or to the younger. A careful reading of the defendants' affidavits present no more than the respective suppositions of the affiants learnedly opining that there "may" or "perhaps" might be a deleterious impact on the imagined tender psyches of the high school students forecast by them. While the limits of governmental prior restraint upon First Amendment activities of students may arguably range somewhat further afield than that which may apply to adults, nonetheless, the defendants

are required to administer their restraints within the limits of Constitutional permissibility. Eisner, summing up the effect of what it described as the leading precedent, Tinker v. Des Moines School District, 393 U.S. 503, stated:

"As for the burden of proof, Tinker, as well as other federal cases, e.g., Blackwell v. Issaquena Board of Education, 363 F.2d 749 (5th Cir. 1966), and a companion case cited with approval in Tinker, Burnside v. Bayrs, 363 F.2d 744 (5th Cir. 1966), established that if students choose to litigate, school authorities must demonstrate a reasonable basis for interference with students' speech, and that courts will not rest content with officials' bare allegation that such a basis existed." (Eisner at p. 810).

This burden, plaintiffs insist, the defendants have failed to meet, nor can they meet. The conclusion of the court below that students of Stuyvesant High School of 13 and 14 years of age "...may be too young and immature to be exposed to a comparison of their sexual attitude and experience with that of their peers." has not been demonstrated by the defendants. The claims of the defendants are speculative and conclusory. They are not established by a reasonably and well accepted body of scientific evidence. (See pp. 4,5, Trachtman Affidavit, 11/8/76.)

With prescience, this court in Eisner adverted to some of the issues that arise in high school censorship cases. In a footnote, Judge Kaufman noted that the "difficult Constitutional problems raised by 'the hecklers' veto', Kalven, The Negro and the First Amendment, 140-41 (1965), becomes particularly acute in a public school, where the threshold of disturbance which may justify official intervention is relatively low." (440 F.2d 803, 809). It is the hecklers' veto here that operates to limit constitutional rights, that is, the speculative belief that there resides in the student population aged 13 and 14 such fragile egos that the presentation randomly to them of the proposed questionnaire and cover letter may shatter the fragility of some students' psyches, and therefore that none can participate in the survey. Even the defendants concede that their concern is but for a minority of the student population. In effect, then, that minority, it is argued, is constitutionally able to "veto" the opportunity of participation by the majority of the school population in plaintiffs' survey. The Supreme Court has emphatically rejected a test of obscenity where First Amendment rights would be limited by "the effect of isolated passages upon the most susceptible persons". (Roth v. United States, 354 U.S. 476 at 489 (1957)). Roth approved a jury charge as follows:

"The test is not whether it would arouse sexual desires or sexual impure thoughts in those comprising a particular segment of the community, the young, the immature, or the highly prudish or would leave another segment, the scientific or highly educated or the so-called worldly wise and sophisticated indifferent and unmoved..."

"...The test in each case is the effect of the book, picture or publication considered as a whole, not on any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community." Id. at 490.

In Butler v. United States, 352 U.S. 380 (1957), Justice Frankfurter suggested the constitutional infirmity that inheres in the kind of restriction approved by the court below. "The incidence of this enactment," he said, "is to reduce the population of Michigan to reading what is only fit for children." Id. at 383-84. As a result of the decision below, 9th and 10th grade students at Stuyvesant High School are denied their First Amendment rights because of the anticipated response of the most immature and impressionable of their classmates.

It is because the Supreme Court was aware that the unfettered imagination of government officials will often conjure up danger beyond what may be reasonably forecast that the court warned against limiting free expression on the basis

of "undifferentiated fear". Tinker v. Des Moines Independent Community School District, supra at 508. In applying that principle, the 5th Circuit has required that a determination to restrict student expression be "based on fact not on intuition..." Butts v. Dallas Independent School District, 436 F.2d 728, 731 (5th Cir., 1971).

If school officials are permitted to deny students access to literature on the basis of some psychologist's opinion that some undetermined number of those students will suffer some vague psychological harm, it is obvious that the potential for destruction of students' First Amendment rights is infinite. Given, for example, the hostility with which many school officials responded to student publications dealing with the war in Vietnam, one can readily imagine a school official suppressing some future anti-war literature and offering the support of a psychologist who warns of the effect of discussions of violence on the tender egos of 13 and 14 year olds. A good number of volumes in the average school library could similarly be proscribed.

The power afforded government, including school officials, to limit expression on the grounds that it will be "harmful" to minors derives from the court's decision in Ginsberg v. New York, 390 U.S. 629 (1968), where the court

upheld the concept of "variable obscenity". The court, however, did not give the state broad, roving authority to determine what was and was not "harmful" for children. Rather, it merely upheld a New York statute, then §484-h of the Penal Law, which restricted the sale of materials to minors according to specific standards adopted from Roth v. United States, supra. That statute narrowly restricted the class of literature that could be kept from children. Defendants do not argue that the survey falls within the definition of the statute. There is no suggestion in Ginsburg, or any other case, that any broader prohibition on expression for minors is constitutionally permissible.

In reviewing the cases leading to the Tinker decision, Mr. Justice Fortas stated:

"Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not fully exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet or to supervised and ordained discussion in a school classroom." Id., 309 U.S. 503, at p. 512.

As plaintiffs read the phrase-"reasonable regulation of speech-connected activities in carefully restricted circumstances"-the Court's teaching refers to regulation. As Judge Motley's carefully proposed elements for negotiation, for distribution of the questionnaire contemplates. Reasonable regulation does not imply prohibition, as regulation seems to be read by the defendants. Plaintiffs do not conceive that presentation of the proposed questionnaire would invade the rights of the others. Their fellow students to whom the proposed questionnaires would be presented under cover of a proposed letter may accept or reject the opportunity of completing them. Those "brittle personalities" alleged to exist within the school population who might be harmed by the mere review of the questionnaire have the easy option of ignoring it. Those who desire to complete the questionnaire have that option. Those members of the student population who reject the stimuli of the outer world that might cause them discomfort may as easily reject the stimulus of the questionnaire. Plaintiffs have chosen this questionnaire as a means of "personal intercommunication" among plaintiffs fellow students.

It is conceded that the questionnaire here is protected First Amendment speech and press activity. It is argued, however, that that activity should be restrained and censored because it will create unrest among a population of students. Although plaintiffs deny that the impact of their rigorously prepared survey will have unsettling effects or create unrest, particularly where the defendants cooperate in the implementation of the plan of distribution, yet, even were defendants able to demonstrate the certainty of some unrest, some unsettling effect upon even the younger population at the school, Tinker requires that plaintiffs be permitted to distribute the survey questionnaire and publish the results.

The court below rejected the precedential value of Bayer v. Kinzler, 383 F.Supp. 1164 (E.D.N.Y. 1974), aff'd, 515 F.2d 504 (1975), although it dealt with the distribution by high school students of material dealing with sexual issues. Yet there the defendant educators argued the propriety of their seizure of a school newspaper containing a sex education supplement on the basis of Schenck v. U.S. (supra), that the distribution would present a clear and present danger that

the State in the person of the Superintendent of Education had a right to prevent. The court's proper rejection of that argument was summed up in words applicable here too:

"It is ironic that the defendant view the dissemination of knowledge here as presenting a 'danger' which will bring about 'evils'." (at p. 1165)

The defendants and the court below concede the impossibility of protecting the students of Stuyvesant High School from the explicit, near pornographic references to sex to which Stuyvesant students are constantly exposed on the newsstands and in the bookstores of Manhattan. Indeed, the court may well take judicial notice that the contemporary high school library contains books with far more graphic sexual passages than the rather clinical sexual references of plaintiff's survey. In analyzing the suitability for presentation of the survey to freshmen and sophomores at the school, consideration may well be directed to the collection of materials present in school libraries to which adolescents are referred. See, e.g., Vaught v. Van Buren Public Schools, 306 F.Supp. 1388 (E.D. Mich. 1969).

It is assumed that the matters with which this questionnaire deals are, indeed, "sensitive", yet they are not only of enormous interest to the high school adolescent, they are virtually co-extensive with adolescent identity:

"Increased sexual drive, influenced by hormonal and anatomical changes, is, of course, a major physiological concomitant of adolescence... Virtually all available data indicate that this specifically sexual interest and behavior of both sexes increases significantly during adolescence, although there are sex differences." Mussen, conger & Kagan, Child Development and Personality, 564, (4th Ed.)

"It is virtually impossible to separate sexuality from identity during adolescence, when sexuality is flowering and influencing a persons total being. Young people's images of themselves, their relationships with their peers, their relationships with their parents -- all are inexplicably bound up with their sexuality." Papalia and Olds, A Child's World, Infancy through Adolescence, 583.

"Intellectual curiosity about sex continues to be a component of adolescent (and adult) sexuality. Boys and girls are voracious seekers after sexual information and get it from whatever sources they can. Some of the frustrations of this age come from not even having the vocabulary with which to talk about these vital matters. The youngsters know all the four-letter words and use them liberally in other contexts, but to use them in discussions of sex cheapens the topic. Curiosity in adolescence, of course, goes way beyond a craving for anatomical and physiological knowledge and extends to 'What do you do?' and 'What is it like?', 'Does it hurt?', 'What happens when?', and 'Is it all right if you...?'" Stone and Church, Childhood and Adolescence, A Psychology of the Growing Person, 469 (3rd Ed.)

Plaintiff urges that to the extent the psychological evidence is at all persuasive it militates for the untrammelled distribution of the questionnaire to students in all grades.

With the District Judge, plaintiff submits that such distribution will be beneficial not only to upper class students "who are sexually immature or who have certain conflicts" but likewise to the younger brothers and sisters and would be as "likely to resolve these problems if they are faced, as a result of peer pressure, with the basic questions and if they are simultaneously made aware of the fact that many other students have similar problems" (memo Op. 9, 10).

CONCLUSION

The Supreme Court has held that "personal intercommunication among the students is also an important part of the educational process" (Tinker). The defendants' posture in the instant case is subverting that process. The personal intercommunication that would be enhanced by the distribution of the proposed questionnaire and publication of its results is instead stifled by defendants.

This court is urged to modify the Order of the court below to enlarge its scope to include all of the students at

Stuyvesant High School, and to affirm that Order.

Respectfully submitted,

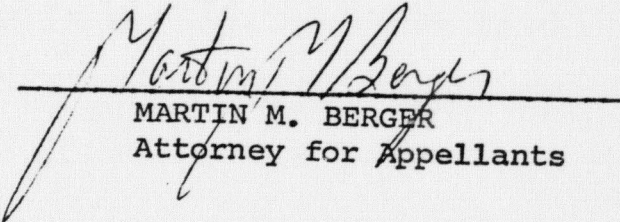
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CERTIFICATE OF SERVICE

This is to certify that I have caused to be served a copy of the foregoing Brief for Appellants upon the counsel of record for Appellees at their office address, Municipal Building, New York, N.Y. 10007, by personal service.

This 18th day of February, 1977.


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